Malayan Banking Bhd v Zainon bte Ismail

HIGH COURT (KOTA BHARU) — ORIGINATING SUMMONS NO 24–251–2000
SURIYADI J
24 MARCH 2001

Civil Procedure *— Time — Delay — Delay of ten years to apply for order of sale — Limitation does not apply — Statute does not prescribe time frame to bring matter to court — Failure to issue notice of intention to proceed — Plaintiff should give defendant one month's notice before proceeding — No explanation for delay — Whether summons should be dismissed — Interpretation Acts 1948 and 1967*

The defendant was the registered owner of two pieces of land. She created a third party legal charge over the property in favour of the plaintiff, a financial institution, as security for a loan facility granted to a company registered as Rampai Muda Development Sdn Bhd. The borrowers defaulted in the repayment of the loan, and the plaintiff as chargee commenced foreclosure proceedings against the defendant, demanding that the defendant pay the amount owing within one month. The defendant failed to comply with the demand, and the plaintiff applied for an order of sale. The property was put up for auction but failed to attract any bids. The land administrator accordingly referred the matter to the High Court. The Land Office later produced a certificate of reference, indicating that the matter had been settled at that office, and for the plaintiff to take it up to the High Court. The plaintiff procrastinated and filed an originating summons in the High Court for an order to put the land up for sale almost ten years later. The originating summons was dismissed with costs. Questions pertaining to limitation periods and their restrictions were raised.

Held:

(1) The plaintiff was clearly not caught by s 21(1) of the Limitation Act, as it had managed to bring the action against the defendant well within the 12-year period. That being so, the Limitation Act was certainly not applicable in this case, hence the court's lack of concern regarding the limitation period. What really attracted the attention of the court was that the plaintiff not only had procrastinated in filing this matter in the High Court, but had also failed to issue any notice of intention to proceed to the defendant, despite the ten year long delay (see p 369A–B).

(2) The plaintiff thus should have given the defendant one month's notice, before undertaking any further action against the defendant, after leaving the case idle far beyond the one year period. Here it lay idle for a period of nearly ten years. By failing to do so, the plaintiff had miserably failed to comply with the above legal requirements, a failure that could not be swept aside by the court (see p 371B).

(3) Apart from the failure to give the one-month's notice, there was also the nagging question of delay on the plaintiff's part, in bringing the action to the High Court. That fact of procrastination of ten years, not only had placed the defendant in a long protracted period of uncertainty, but had also gravely burdened her in having to deal with an unfinished lawsuit. As the court could not view such deliberate delay by the plaintiff lightly, a stringent approach in dealing with the matter at hand was necessary (see p 371C–D).

(4) The court also found that there was an absence of any good explanation for the long delay supplied by the plaintiff. One last point the court had to ponder was that, even though s 419 of the National Land Code 1965 did not prescribe any time frame to bring the matter to the High Court, the plaintiff on the other hand could not brush aside s 54(2) of the Interpretation Acts 1948 and 1967 (see p 371F–G). The plaintiff in this case could not be said to have acted with all convenient speed.

[**Bahasa Malaysia summary**

Defendan adalah tuan punya berdaftar dua bidang tanah. Beliau telah mewujudkan gadaian pihak ketiga ke atas hartanah tersebut yang berpihak kepada plaintif, suatu institusi kewangan, sebagai jaminan untuk kemudahan pinjaman yang diberikan kepada syarikat yang didaftarkan sebagai Rampai Muda Development Sdn Bhd. Peminjam-peminjam telah ingkar membuat pembayaran bagi pinjaman tersebut, dan plaintif sebagai pemegang gadaian telah memulakan prosiding penutupan terhadap defendan-defendan, menuntut defendan untuk membayar jumlah yang terhutang dalam masa satu bulan. Defendan telah gagal untuk memenuhi permintaan tersebut, dan plaintif memohon suatu perintah jualan. Hartanah tersebut dibuka untuk lelongan awam tetapi gagal menerima sebarang tawaran. Maka pentadbir tanah merujuk perkara tersebut kepada Mahkamah Tinggi. Pejabat Tanah kemudiannya mengemukakan suatu sijil rujukan, menunjukkan bahawa perkara tersebut telah pun diselesaikan di pejabat tersebut, dan adalah bagi plaintif untuk membawanya ke Mahkamah Tinggi. Plaintif telah berlengah-lengah dan memfailkan saman pemula di Mahkamah Tinggi untuk suatu perintah untuk menjual tanah tersebut hampir sepuluh tahun kemudian. Saman pemula tersebut telah diketepikan dengan kos. Persoalan berkenaan tempoh had masa dan sekatannya telah diambilkira.

Diputuskan:

(1) Plaintif dengan jelas tidak disekat di bawah s 21(1) Akta Had Masa, kerana ia sempat membawa tindakan tersebut terhadap defendan dalam tempoh masa 12 tahun. Dengan itu, Akta Had Masa sememangnya tidak terpakai di dalam kes ini, membuatkan

mahkamah kurang memberi perhatian terhadap tempoh had masa. Apa yang menarik perhatian mahkamah adalah bahawa plaintif bukan sahaja berlengah-lengah di dalam memfailkan perkara ini di Mahkamah Tinggi, tetapi juga gagal untuk mengeluarkan sebarang notis niat untuk bertindak terhadap defendan, walaupun kelewatan selama sepuluh tahun (lihat ms 369A–B).

(2) Plaintif sepatutnya memberikan defendan notis satu bulan, sebelum mengambil sebarang tindakan yang selanjutnya terhadap defendan, selepas membiarkan kes begitu jauh melampaui tempoh satu tahun. Di sini ia dibiarkan begitu saja untuk suatu tempoh yang hampir sepuluh tahun. Oleh kerana gagal berbuat demikian, plaintif telah gagal teruk untuk mematuhi keperluan undang-undang di atas, suatu kegagalan yang tidak boleh diketepikan oleh mahkamah (lihat ms 371B).

(3) Selain daripada kegagalan untuk memberi satu bulan notis, juga terdapat persoalan di pihak plaintif, di dalam membawa tindakan ke Mahkamah Tinggi. Fakta kelengahan selama sepuluh tahun bukan saja meletakkan defendan dalam suatu tempoh berpanjangan di dalam keadaan yang tidak menentu, tetapi juga membebankannya di dalam terpaksa berdepan dengan tindakan yang belum lagi siap. Oleh kerana mahkamah tidak boleh memandang ringan kelengahan yang disengajakan oleh plaintif, suatu pendekatan yang ketat di dalam menguruskan perkara tersebut adalah perlu (lihat ms 371C–D).

(4) Mahkamah juga mendapati tidak terdapat penerangan baik yang diberikan plaintif untuk kelewatan tersebut. Suatu perkara yang terakhir adalah bahawa, walaupun s 419 Kanun Tanah Negara 1965 tidak memperuntukkan sebarang tempoh masa untuk membawa tindakan ke Mahkamah Tinggi, plaintif sebaliknya tidak boleh mengenepikan s 54(2) Akta Tafsiran 1948 dan 1967 (lihat ms 371–G). Plaintif di dalam kes ini tidak boleh dikatakan telah bertindak secara pantas.]

Notes

For cases on delay, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4855–4856.

Cases referred to

China Insurance Co Ltd v Yeong Ah Lan & Anor [1973] 2 MLJ 185 (refd)

Collector of Land Revenue, Kota Bharu, The v Yusoff bin Yunus [1977] 2 MLJ 53 (refd)

Deighton v Cockle [1912] 1 KB 206 (refd)

Krakauer v Katz [1954] 1 All ER 244 (refd)

Perwira Affin Bank Bhd v Lim Weow @ Lim Neu [1998] 3 AMR 2204 (refd)

Legislation referred to

Limitation Act 1953 s 21(1)
National Land Code 1965 ss 5, 254(3)(b), 260, 265(3)(b), 419
Interpretation Acts 1948 and 1967, s 54(2)
Rules of the High Court 1980 O 3 r 6

Ting Hun Yin (*Lua & Mansor*) for the plaintiff.
Zainon bte Ismail representing herself as the defendant.

Suriyadi J. : The defendant is the registered owner of two pieces of land held under GM 1953 Lot 2868, and GM 1954 Lot 2869, of Mukim Tenus, Daerah Gunung Timur, Jajahan Bachok, Kelantan ('the property'). The plaintiff is a financial institution. On 7 July 1985 a third party legal charge over the property was created by the defendant, in favour of the plaintiff as security for a loan facility of RM200,000 granted by the latter, to a company registered as Rampai Muda Development Sdn Bhd.

The borrowers defaulted in the repayment of the loan, and on 1 January 1989, the plaintiff as chargee through their counsel, had exercised their statutory right by commencing foreclosure proceedings against the defendant by issuing a notice under s 254 of the National Land Code 1965 ('the NLC'). The plaintiff demanded that the defendant pay the amount owing within one month, as stipulated in the notice. The defendant however had failed to comply with the demand, and consequently the plaintiff taking advantage of s 254(3)(b) of the NLC, had applied for an order of sale from the land administrator pursuant to s 260 of the NLC.

The property was put up for auction on two occasions in the Land Office, but had failed to attract any bids. Pursuant to s 265(3)(b) of the NLC, the land administrator of the Land Office accordingly had the matter referred to the High Court. On 10 October 1990, the Land Office had produced a certificate of reference, indicating that the matter was already settled at that office, and for the plaintiff to take the matter up to the High Court. The plaintiff however, took its time in filing the case at the High Court. In fact, there was a gap of nearly ten years before it decided to proceed with it against the defendant. Finally on 23 September 2000, the plaintiff filed an originating summons in the High Court for an order to put the land up for sale. On the day of the hearing, I had dismissed the originating summons with costs.

As I perceived it, I had to decide whether the originating summons filed by the plaintiff in the High Court, ten years after the issue of the certificate of reference from the Land Office, had caused the plaintiff's action to be statute barred, ie caught by any limitation period and their restrictions (see s 21(1) of the Limitation Act 1953 where the period of 12 years is the cut off point), or whether there was a need for any notice to be given to the defendant. In the case of *Perwira Affin Bank Bhd v Lim Weow @ Lim Neu* [1998] 3 AMR 2204, a Court of Appeal's decision, at p 2206, para 2(b) is authored:

> Furthermore, under s 21(1) of the Act, time actually runs from the date the right to receive money accrued namely when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice on

> 2 November 1979. The respondent had one month within which to make payment ie 2 December 1979; therefore, the twelve year limitation period expired on 1 December 1991.

In the current case however, the plaintiff was clearly not caught by s 21(1) of the NLC, as it had managed to bring the action against the defendant well within the 12 years period. That being so the Limitation Act is certainly not applicable in this case, hence my lack of concern regarding the limitation period. What really attracted my attention was that the plaintiff not only had procrastinated in filing this matter in the High Court, but had also failed to issue any notice of intention to proceed to the defendant, despite the ten year long delay.

Procedurally, there is no provision that governs the practice of issuing the certificate of reference, by the land administrator, an administrative act that is routinely done at the Land Office. As regards the procedure for sale by the land administrator, s 265 of the NLC takes prominence. Bearing in mind the nature of the legal problem, I would like to confine my arguments only within the boundaries of s 265(3)(b) of the NLC. This sub-provision provides:

> If at the subsequent sale no bid is received at or above the reserve price:
>
> (a) ... ;
>
> (b) the land administrator shall refer the matter to the court; and
>
> (c) the Court may substitute for the order of the land administrator an order for sale under s 256 of the NLC, or make such other order as it may think just.

The sub-provision above, only prescribes that 'the matter' be referred to the court (interpreted as the High Court as per s 5 of the NLC), if the Land Office has received no bid on the charged property. It is absolutely inadequate about the procedures and processes, and thus leaving the interested party in total darkness as to the procedure he ought to adopt. The decision in the case of *The Collector of Land Revenue, Kota Bharu v Yusoff Bin Yunus* [1977] 2 MLJ 53, in some small way is of assistance, as Mohamed Zahir J (as he then was), had occasion to state:

> I am therefore of the opinion that in matters of this nature it will be sufficient for the collector to issue a certificate to be called Certificate of Reference under s 265(3)(b) of the NLC addressed to the court if requested by the chargee and deliver it to the chargee. Such certificate should contain the particulars of sale of the land concerned and the reasons for the sale not being successful … .

Unfortunately, the above case is silent as to the time limit considered reasonable or fixed, for the chargee to file the matter in the High Court, pursuant to such certificate. I certainly have failed to identify any specific provision in the National Land Code too, or case law for that matter, which could provide an answer.

Therefore, under the circumstances I was forced to allude to other connected provisions or statutes in order to resolve the matter at hand. A provision that came to mind and highly relevant to circumvent the dearth of any specific provision in the National Land Code is s 419 of the NLC. It reads:

> Power of Registrar and land administrator to refer questions to the court
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> (1) The Registrar and, subject to sub-s (3) any land administrator may, if he considers it necessary or desirable to do so, refer to the court any question arising in the exercise or performance of any power of duty conferred or imposed on him by or under this Act.
>
> (2) Any such reference shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the court shall on any such reference either determine the question in issue or make such other order as it may consider appropriate in the particular circumstances of the case.

Section 419(2) of the NLC which speaks of 'reference', certainly has enough depth to cover the scenario envisaged by the above s 265(3) of the NLC. The latter also provides that, but within the circumstances promulgated in s 265 of the NLC, the land administrator shall refer to the High Court any question arising in the exercise or performance of any power of duty imposed on him. Having perused all the above provisions, I did not hesitate in concluding that the above phrase 'the provisions of any written law relating to civil procedure' in s 419(2) of the NLC, must include the Rules of the High Court 1980. That being so, O 3 r 6 of the Rules of the High Court 1980 ('the RHC') must take prominence in this discussion. It reads:

> Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.

(Whether by coincidence or design, the above provision explicitly resorts to the word 'matter', which happens to be similar with that of s 265(3)(b), which, to reiterate, reads 'the land administrator shall refer the matter to the court').

To illustrate the importance of the one month's notice, as demanded by the Rules of the High Court 1980, I now advert to the case of *China Insurance Co Ltd v Yeong Ah Lan & Anor* [1973] 2 MLJ 185, where Syed Othman J had occasion to state:

> … but the plaintiff did not give the one month's notice before issuing the notice of trial. No reason has been given as to why the one month's notice could not have been given before the notice of trial was issued. Mr Wilson himself has agreed that the notice should have been given. I set aside the notice of trial.

A poser, which also had to be resolved, was whether a final judgment had been obtained in this case. If one had been obtained, then it would have been untenable for me to invoke the provision of O 3 r 6 of the RHC. I had to eliminate this last possible legal stumbling block as the *Annotated Statutes of Malaysia*, pertaining this provision, at pp 34–36 had this to comment:

> 'Proceeding' indicates a step 'towards' judgment and the rule therefore applies only when judgment has not been entered up; where judgment has been entered up within the year, no notice need be given under this rule before execution issues on the judgment: *Taylor v Roe* (1893) 68 LT 253; *Houlston v Woodall* (1884) 78 LT 113.

Having considered all the salient facts I was fully satisfied that this was not the case here. In fact, as far as the proceedings in the High Court were concerned, not much progress had been made. To put it succinctly we were still at the infant stage of the case, thus enabling me to advert to this sub-provision for assistance (*Deighton v Cockle* [1912] 1 KB 206).

To wind up this point, the plaintiff here thus should have given the defendant one month's notice, before undertaking any further action against the defendant, after leaving the case idle far beyond the one year period. Here it lay idle for a period of nearly ten years. By failing to do so, the plaintiff had miserably failed to comply with the above legal requirements, a failure that could not be swept aside by me.

Apart from the failure to give the one-month's notice, there was also the nagging question of the delay on the plaintiff's part, in bringing the action to the High Court. That fact of procrastination of ten years, not only had placed the defendant in a long protracted period of uncertainty, but had also gravely burdened him in having to deal with an unfinished lawsuit. As I could not view such deliberate delay by the plaintiff lightly, a stringent approach in dealing with the matter at hand was necessary. In *Krakauer v Katz* [1954] 1 All ER 244, it was held that in view of the failure to take any steps for twelve days, the plaintiff ought not to be allowed to proceed with the action. Denning LJ there had occasion to remark:

> I am disposed to agree that, by analogy with the Limitation Act 1939, if a plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why he should be allowed to go on with it.

By analogy I could not simply dismiss the issue of delay as a mere irregularity as it was easily rectifiable, let alone it being unreasonably long. Even though mindful that the current case was not pursuant to an application to dismiss the originating summons for want of prosecution, the reasoning of Lord Denning were highly enlightening, and thus useful. Trudging along I also found that there was an absence of any good explanation for the long delay supplied by the plaintiff. One last point I had to ponder was that, even though the abovementioned s 419 of the NLC did not prescribe any time frame to bring the matter to the High Court, the plaintiff on the other hand could not brush aside s 54(2) of Interpretation Act 1948 and 1967. It provides:

> Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed …

The plaintiff in this case could not be said to have acted with all convenient speed.

Based on all the above reasons, I had no hesitation in dismissing the matter with costs.

Order accordingly.

Reported by Wong Ee Lynn